No. 96-578

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ALLEMNORE COMMUNITY HOSPITAL, INC., *et al.*,

Petitioners,

v.

THE UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Petitioners reply to new matter raised in the Brief of United States in Opposition to Petitioners Petition for Writ of Certiorari. The Government has made two statements that leave an incorrect impression with the Court.

1) First, the Government asserts that "hundreds of Medicare providers have invoked Section 1395oo to challenge the level of their outlier reimbursement . . . ", citing *Alvarado Community Hosp. v. Shalala,* No. CV 94-0972 (and consolidated cases) (C.D. Cal 1996), appeal pending, No. 96-55967 (9th Cir., filed June 19, 1996), (Opp. 10.), and concludes that Petitioners similarly could have utilized section 1395oo rather than the Tucker Act. All the hospitals in *Alvarado,* however, previously had filed appeals on other Medicare reimbursement issues, and added the outlier payments issue to their pending appeals after the 180-day appeal window had elapsed,[1] as provided by 42 C.F.R. § 405.1841(a)(1). Contrary to the implication in the Government's brief, only one hospital in the nation has ever been identified as having noticed an appeal of the outlier issues within the 180-day appeal window for either of the two cost reporting years involved in this case (1985 and 1986).

The *Alvarado* hospitals fortuitously had appeals pending to which they could add an outlier payment challenge. The 305 hospital Petitioners had no such appeals pending, however, and were unable to present

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[1] Counsel for the *Alvarado* hospitals, John Hellow of Hooper, Lundy & Bookman, Inc., is counsel for many of the hospitals in these cases.

their claims in a timely fashion to the PRRB. That is precisely the dilemma described to the Court by Hospitals as a basis for the Court to exercise its jurisdiction to review these cases. (Pet. 20, n.13, 21-22.) The government's assertions about the significance of *Alvarado* prove precisely the opposite point, *viz.*, that Hospitals have been deprived of equal protection of the laws, and that they were unable – through no fault of their own – to utilize the statutory remedies of section 1395oo.

2) The government also asserts that "petitioners have not exhausted their administrative remedies before the PRRB." (Opp. 11.) That Hospitals have, however, exhausted their *available* administrative remedies by submitting requests for reopening to their fiscal intermediaries, the Secretary's agents, and so alleged in their complaints. Pet. 5-6, 19, 24.[2]

The PRRB was not available to the Hospitals, the large majority of which could not have made use of the three-year "good cause" extension for PRRB appeals under 42 C.F.R. § 1841(b) even if that regulation is valid. *See* Pet. 20, n.13; Opp. 5, n.5. If the three-year extension was not available to a hospital, any waivable requirement imposed by the Secretary should be deemed to have been waived or met. *Cf. Heckler v. Ringer,* 466 U.S. 602, 617 (1984) (noting a two-part exhaustion requirement under separate portion of Social Security Act, comprised of non-

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[2] The hospitals had no available administrative remedy similar to hospitals with claims less than $10,000 – which even the government and the Federal Circuit acknowledge may invoke the Tucker Act. *See Appalachian Reg. Healthcare, Inc. v. United States,* 999 F.2d 1573, 1577 (Fed. Cir. 1993).

waivable presentment requirement and waivable requirement that administrative remedies prescribed by Secretary be followed). In addition, 42 U.S.C. § 405(h)'s second sentence should be deemed to have been met even if the governments' interpretation of it is correct (which it is not).

No finding of fact has been made as to which Hospitals had even the opportunity to utilize the "good cause" regulation. *See* App. 3-12. A remand to the trial court would be necessary to make such a determination. It would be improper to make any such factual finding, in the guise of a ruling on exhaustion, on appeal in the Federal Circuit or this Court.

CONCLUSION

Petitioners request that the Court grant the writ of certiorari to the Federal Circuit.

Respectfully submitted,

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